

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A.
DREW EDMONDSON, in his capacity as
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA and
OKLAHOMA SECRETARY OF THE
ENVIRONMENT C. MILES TOLBERT,
in his capacity as the TRUSTEE FOR
NATURAL RESOURCES FOR THE
STATE OF OKLAHOMA

PLAINTIFFS

v.

CASE NO.: 4:05-CV-329-TCK-SAJ

TYSON FOODS, INC., TYSON
POULTRY, INC., TYSON CHICKEN,
INC., COBB-VANTRESS, INC.,
AVIAGEN, INC., CAL-MAINE FOODS,
INC., CAL-MAINE FARMS, INC.
CARGILL, INC., CARGILL TURKEY
PRODUCTION, LCC, GEORGE'S,
INC., GEORGE'S FARMS, INC.,
PETERSON FARMS, INC. SIMMONS
FOODS, INC., and WILLOW BROOK
FOODS, INC.

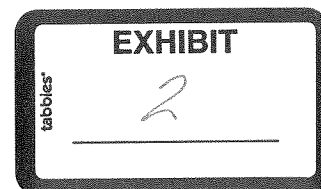
DEFENDANTS

**DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR
ENTRY OF PROPOSED CONFIDENTIALITY ORDER**

COME NOW Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc.,
Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey
Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods,
Inc., and Willow Brook Foods, Inc. (collectively "the Poultry Defendants"), and by and through
their attorneys, and submit the following as their Response to Plaintiff's Motion for Entry of
Proposed Confidentiality Order (Dkt. No. 513).

I. Introduction

4841-1397-5041.1



In its Motion for Entry of Proposed Confidentiality Order ("Motion"), Plaintiff has asked the Court to enter an order to limit the use and disclosure of confidential documents which may be produced by parties during discovery in this case. The Poultry Defendants agree that the entry of an appropriate confidentiality order is necessary in this case. However, the Poultry Defendants object to the form of Plaintiff's proposed Confidentiality Order attached as Exhibit ___ to its Motion. Accordingly, the Poultry Defendants ask this Court to instead enter the Confidentiality Order attached hereto as Exhibit 1.¹

II. Proprietary and Confidential Business Information

This case involves numerous law firms representing scores of different parties including individuals, small business owners, corporations, municipalities and at least two public officials for the State of Oklahoma. Given the number of parties involved in this case, the overly-broad nature of the Plaintiff's allegations, and the Poultry Defendants' status as rivals in a highly-competitive industry, the prosecution or defense of this case may require the use of information, documents, or items which a disclosing party necessarily and appropriately views as proprietary, trade secrets or highly-confidential business or personal information. The dissemination of such sensitive information or documents beyond the attorneys or experts who may have a legitimate need to consult such information or documents as part of their role in this case could cause material, irreparable harm to the disclosing party. Because of these realities, the Poultry Defendants have proposed a two-tiered Confidentiality Order that would allow a party to designate highly-confidential, trade secret, and sensitive documents or other items as "Confidential – Attorney's Eyes Only," which designation would cause such documents and items to be available for viewing only by counsel or experts for the parties.

¹ For the Court's convenience a redlined version of the Confidentiality Order proposed by the Poultry Defendants highlighting the differences between the Poultry Defendants' proposed Confidentiality Order and the one proposed by Plaintiff is attached hereto as Exhibit 2.

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A two-tiered confidentiality order with additional protections for highly-sensitive and competition-related information or documents is necessary in this case because the Poultry Defendants are participants in the same competitive market, i.e., producing poultry products. As a result, there is understandable concern about the potential for highly-sensitive documents which may contain trade secrets or competitive information produced by one of the Poultry Defendants being disseminated to, discussed with, and/or used by non-legal, business representatives of other Poultry Defendants. Such dissemination could irreparably harm a Poultry Defendant and erode years of investment and important research and development.

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Plaintiff's proposed Confidentiality Order makes no distinction between ordinary confidential information and highly-sensitive confidential information. Under the Confidentiality Order proposed by Plaintiff, both types of information could be shared with non-legal, business representatives of other parties to this action. To address this important issue, the Poultry Defendants proposed to Plaintiff, and now propose to this Court, a two-tiered Confidentiality Order pursuant to which all parties could designate items as either "Confidential" or "Confidential – Attorney's Eyes Only." A two-tiered Confidentiality Order would allow a party to designate highly-confidential documents or other items, which if disclosed to a competitor might cause material, irreparable injury to the disclosing party, as suitable for viewing only by counsel for the parties. Importantly, other courts have recently recognized the values the Poultry Defendants seek to protect. See Ex. 3, Order entered _____ in *Thompson et al v. Tyson Foods, Inc. et al*, Mayes County, Oklahoma District Court Case No. CJ ____; and Ex. 4, Order entered _____ in *Green et al v. Tyson Foods, Inc. et al*, Washington County, Arkansas Circuit Court Case No. CIV-03-2150.

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The Poultry Defendants' proposed a two-tiered confidentiality order to Plaintiff's prior to the filing of Plaintiff's motion. That proposal was summarily rejected by Plaintiff without any explanation as why Plaintiff objected to this approach. In fact, it is unfathomable why Plaintiff would object to "Confidential – Attorney's Eyes Only" provisions since: (1) such an approach will not affect the scope, breadth, type, or amount of information or documents Plaintiff will have access to through discovery; and (2) such provisions will not delay Plaintiff's access to information or documents as compared to the approach Plaintiff proposes. The Poultry Defendants ask that any Confidentiality Order entered by this Court incorporate a two-tiered approach to confidentiality with the parties having the ability to designate highly-sensitive information or documents as "Confidential - Attorney's Eyes Only" information.

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III. Plaintiff's Proposed "Certification" Provisions are Unnecessary and Unduly Burdensome

The Poultry Defendants also object to the "attorney certification" provisions of Plaintiff's proposed Confidentiality Order. See Pls. Proposed Order ¶'s ____. Under the Confidentiality Order proposed by Plaintiff, an attorney must complete one or more certifications covering every document which a party seeks to designate as "confidential" and provide that certification to other parties in this action. See Pls. Proposed Order ¶'s ____. The Poultry Defendants would not object to a provision requiring that documents or other items may be designated as "Confidential" or "Confidential – Attorney's Eyes Only" only after an attorney has reviewed such documents or items and has in good faith determined that the documents or items contain information or material which properly should be considered confidential in nature. The Poultry Defendants do object, however, to Plaintiff's attempt to add an additional layer of bureaucratic and unnecessary paperwork requirements.

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The Poultry Defendants are unaware of any instance in which this Court or other federal courts in this district have imposed such an attorney certification provisions upon litigants.²

There is no history of “over-designation” or abusive discovery tactics in this case to warrant such extraordinary and time consuming requirements. Counsel of record in this action are reputable professionals. Plaintiff’s request for the completion, execution and submission of certification by counsel every time a confidential document is produced will simply create unnecessary red tape in a case that is already complex due to the actions and overly-broad allegations of Plaintiff. Plaintiff has made no demonstration as to why the burdensome “certification” procedure is necessary or appropriate in this case. Such a requirement is simply unduly burdensome and any benefits (Plaintiff identifies none) provided by such a certification are far outweighed by the burden imposed upon the parties in dealing with superfluous paperwork. Moreover, it should be anticipated that the Plaintiff’s bureaucratic “certification” proposal will cause delays and bottlenecks in the discovery process. Thus, this Court should not require the attorney certification requirement proposed by Plaintiff in any Confidentiality Order it enters.

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IV. CONCLUSION

For the foregoing reasons, the Poultry Defendants request that this Court deny Plaintiff’s Motion for Entry of Proposed Confidentiality Order. The Poultry Defendants request that this Court enter a Confidentiality Order incorporating a two-tier system of confidential designation and eliminating the requirement that all confidentiality designations be formally certified by

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² Plaintiff cites to the model protective order used by the United States District Court for the District of South Carolina as the singular example of a court which apparently recommends similar attorney certification provisions. Motion, p. 2 (referring the Court to a model order found at www.scd.uscourts.gov/DOCS/confidential/confidentialityorder.pdf.) The U.S. District Court for the Northern District of Oklahoma has not apparently adopted a model protective order. However, there are many federal courts in other districts which have adopted model protective orders which do not require attorneys to certify confidential designations through attorney affidavits. See, e.g., www.nysd.uscourts.gov/Individual_Practices/Rakoff/rjs_model_prot_ord.pdf (S.D. N.Y.), [www.cand.uscourts.gov/cand/form.nsf/7813fd3053452aef88256d4a0058fb31/5e428ee77bf8e03b88256dd3005d9450/\\$FILE/StipulatedProtectiveOrder-1-03.pdf](http://www.cand.uscourts.gov/cand/form.nsf/7813fd3053452aef88256d4a0058fb31/5e428ee77bf8e03b88256dd3005d9450/$FILE/StipulatedProtectiveOrder-1-03.pdf) (N.D. Cal.) (also including a two-tiered approach to confidentiality with an “Attorney’s Eyes Only” category).

affidavits of counsel. Accordingly, the Poultry Defendants request that this Court enter a Protective Order in this case in a form substantially similar to the order attached hereto as Exhibit 2.

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Respectfully submitted:

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 AND CAL-MAINE FOODS, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of May, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

Jo Nan Allen	Frederick C. Baker	Tim K. Baker
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John Elrod	William B. Federman	Bruce W. Freeman
Ronnie Jack Freeman	Richard T. Garren	D. Sharon Gentry
Tony M. Graham	James M. Graves	Michael D. Graves
Thomas J. Grever	Jennifer S. Griffin	Carrie Griffith

John T. Hammons	Jean Burnett	Michael T. Hembree
Theresa Noble Hill	Philip D. Hixon	Mark D. Hopson
Kelly S. Hunter Burch	Stephen L. Jantzen	Mackenzie Hamilton Jessie
Bruce Jones	Jay T. Jorgensen	Krisann C. Kleibacker Lee
Raymond T. Lay	Nicole M. Longwell	Dara D. Mann
Linda C. Martin	A. Scott McDaniel	Robert Park Medearis, Jr.
James Randall Miller	Robert A. Nance	John Stephen Neas
George W. Owens	David Phillip Page	K. Clark Phipps
Marcus N. Ratcliff	Robert P. Redemann	M. David Riggs
Randall E. Rose	Patrick Michael Ryan	Robert E. Sanders
David Charles Senger	William F. Smith	Jennifer F. Sherrill
Colin H. Tucker	John H. Tucker	R. Pope Van Cleef, Jr.
Kenneth E. Wagner	David A. Walls	Elizabeth C. Ward
Sharon K. Weaver	Timothy K. Webster	Gary V. Weeks
Adam Scott Weintraub	Terry W. West	Dale Kenyon Williams, Jr.
E. Stephen Williams	Douglas Allen Wilson	J. Ron Wright
Lawrence W. Zeringue	Bobby Jay Coffman	

and I further certify that a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage properly paid, on the following who are not registered participants of the ECF System:

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